

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CRIMINAL REVISION NO. E007 OF**

**2024**

REPUBLIC

(DIRECTORATE OF CRIMINAL INVESTIGATIONS) -----

APPLICANT

VERSUS

GEORGE MUHOHO-----1<sup>ST</sup>

RESPONDENT

JOSEPH MBUGUA (LANDLORD JUPITER HOUSE)-2<sup>ND</sup>

RESPONDENT

EDWIN MATENJWA-----=-----3<sup>RD</sup>

RESPONDENT

JOSEPH NGUGI (LANDLORD LUXOR PLAZA)-----4<sup>TH</sup>

RESPONDENT

JOHN NJENGA-----5<sup>TH</sup>

RESPONDENT

JOSEPH KAMORE (LANDLORD SOKO STALLS)-----6<sup>TH</sup>

RESPONDENT

SIMON GITHIRI AKA SAMUEL-----7<sup>TH</sup>

RESPONDENT

JOSEPH MBUGUA(OWNER ESCAPRMENT HOTEL)

-----8<sup>TH</sup> RESPONDENT

### RULING

1. The applicant herein filed in the Chief Magistrate Court ex-parte notice of motion applications dated, 29<sup>th</sup> February, 2024 vide Chief Magistrate Criminal Miscellaneous Application No(s). E019, E020, E021 and E022 of 2024 brought under the provisions of sections 26, 118, 118A and 121 of the Criminal

Procedure Code (Cap 75) Laws of Kenya, section 64 of the National Police Service Act (Cap 84) Laws of Kenya, sections 89(1) and 90 of the Kenya Information and Communications Act (Cap 411A) Laws of Kenya and all other enabling provisions of law seeking for orders that:-

*a) That this application be deemed fit for admission for hearing on priority basis.*

*b) That the Honourable Court be pleased to issue to the applicant, a search warrant so as enable No. 101749 SGT Molo Jackton, a Police Officer with the Directorate of Criminal Investigations, the applicant herein, stationed at Communications Authority of Kenya (CA) as an enforcement officer/criminal investigator, and as the Authority's authorized officer in this regard, with such assistance as shall be required, and to use if necessary, reasonable*

*force for that purpose, enter, search every part of the said premise and/or designated structure in the compound belonging to the respondents, seize and take possession of the said telecommunication apparatus/systems, including its manuals and/or documentations, any electronic gadgets connected thereto or aiding its operation, relevant documents as to the operations of the enterprise, and any other material evidence of aiding/running the operations of the said Telecommunication System by the respondents, at any of the respondent's offices, premises and/or other designated structures owned/controlled by the respondents, within the jurisdiction of this Court.*

*c) That currently, the said telecommunication system/infrastructure belonging to respondents*

*is known/has been identified to operate from the commercial premises in the name and style of Luxor Plaza in Naivasha (2nd respondent), within Naivasha town of Nakuru county, Escarpment Motel and Jupiter House both within Mai Mahiu Town of Nakuru County.*

*d) That, there be no orders as to costs of this application.*

2. The applications were considered on the same date, by the trial Magistrate Hon. J. Ndengeri (PM) who stated as follows: -

*“The orders sought though ex parte are final orders. The court opines that the respondents should be served forthwith. Serve the respondents in seven (7) days. Mention on 6<sup>th</sup> March, 2024.”*

3. Being aggrieved by the ruling the applicant filed a revision application vide a letter dated 29<sup>th</sup>

February, 2024 premised on the provisions of sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya, seeking for the following orders: -

*a) Review of the orders of the trial Magistrate that the respondents be served and matter be heard inter parties on 6<sup>th</sup> March, 2024.*

*b) That this Honourable court be pleased to grant the orders for search and seizure of telecommunications apparatus/systems owned/controlled by the respondents in Criminal Miscellaneous Application Nos. E019/2024, E020/2024, E021/2024 AND E022/2024.*

*c) Any other order that the court may deem fit.*

4. The application was based on the grounds: -

- a) That if the respondents in the above mentioned matters are served and allowed time, for interparte hearing they are likely to interfere with the said equipment and defeat the purpose of the said applications.*
- b) That if the matter proceeds inter-parties before the said equipment are safeguarded in the custody of Communication Authority, then the ends of justice will be defeated.*
- c) That if the respondents are served and given time for interparte hearing, they are likely to relocate the said equipment and continue with operation in a different place.*
- d) That the said equipment that have been installed without authorization from the Communication Authority pose a great danger to the safety of the public and cyberspace.*

*e) That the respondents are likely to migrate the equipment to another location if they are served and allowed time for interparte hearing, since they have done so in the past.*

*f) That if the orders sought are not granted exparte, will result to the whole application being nugatory as the subject matter will have been moved.*

*g) That the orders sought are in the public interest in preserving the safety of the larger public.*

5. The court directed the applicant to serve the respondents for inter-parties hearing and ordered that the subject equipment should not be moved from the premises where they are in circumstances that will render the matter redundant or the court moot or prejudice the same.
6. Be that as it may, the 1<sup>st</sup> respondent filed a replying affidavit sworn on the 13<sup>th</sup> April, 2024 in response to

and denied the averments in the supporting affidavit

7. He averred that he has never been contacted with regards to the purported telecommunication apparatus nor to confirm that he hasn't obtained the requisite license from the Communication Authority.
8. He further denied that his employee, Joseph Nderitu, signed the notice of cessation on his behalf. That in any case, the notice of cessation indicates the owner of the impugned equipment to be Joseph Nderitu and who has personally acknowledged that he was in the process of acquiring the license registration for the same.
9. Furthermore, the applicant has failed to establish that he owns or operates the impugned equipment and is therefore a stranger to the proceedings which should be dismissed.

10. The 3<sup>rd</sup> respondent opposed the revision application through grounds of opposition dated 22<sup>nd</sup> April, 2024 which that: -

*a) The application has been brought in bad faith.*

*b) The application is intended to infringe on the 3<sup>rd</sup> respondent's right to a fair hearing.*

11. The 3<sup>rd</sup> respondent further filed a replying affidavit sworn on the even date wherein he avers that the revision application does not meet the threshold for invocation of sections 362 and 364 of the Criminal Procedure Act and should therefore be dismissed.

12. He contended that the application dated 28<sup>th</sup> February, 2024 filed in the trial court was premised on falsehoods aimed at misleading the court. That, he is a director of Megalink Solutions Ltd which company leased the subject premises from the 4<sup>th</sup> respondent.

13. That subsequently, the company entered into an agreement with Liquid Telecommunications Kenya permitting it to install and operate equipment inter alia fibre optic cables, transmission cables and network systems on the subject premises, and further agreed that any such equipment installed and/or operated remains to be their property.

14. That in the circumstances, the equipment in the suit premises is solely owned and/or operated by Liquid Telecommunication Kenya and therefore the 3<sup>rd</sup> respondent cannot interfere with the equipment as it risks breaching the agreement and shall result to imposition of massive penalties.

15. Further that the applicant is oblivious of the agreement between Megalink Solutions Ltd and Liquid Telecommunication Kenya, and in the absence of compelling evidence against the 3<sup>rd</sup> respondent, it is only fair and right that the 3<sup>rd</sup>

respondent is accorded an opportunity to defend itself.

16. He further averred that, the Communications Authority has the mandate and power to stop the broadcasting of any frequencies operating without a license which power can be enforced without the orders sought, and are free to enter the premises and take photos of the equipment.

17. The 8<sup>th</sup> respondent opposed the revision application vide a replying affidavit sworn on 18<sup>th</sup> April, 2024 where he averred that, the order sought in the trial court were final orders which defeat the purposes of the provisions of section 118 and 118A of the Criminal Procedure Code.

18. That, under section 118 and 118A of the Criminal Procedure Code the applicant is required to indicate the period the orders sought will remain in force but should not exceeding 14 days, and the court order

must give a return date to court. That, the application and court order must thereafter be served after the first ex-parte hearing and parties heard before extension of orders.

19. In the circumstances, the orders sought by the applicant being final orders would have been issued without a return date on how the orders would be implemented and would have violated his right to a fair hearing and administrative action as the 8<sup>th</sup> respondent would not have been given an opportunity to be heard.

20. Therefore, the trial court was properly directed in declining to issue orders sought and, that in the interest of justice, this court should not interfere with the trial court's directions and should order the matter be returned to the trial court for further directions.

21. However, should the court be pleased to grant the orders sought, it should limit access to entry and search of the premises, and if any seizures are ordered it should be limited to the telecommunication systems only to the exclusion of other systems and/or personal properties. Further, the court should provide guidance on the period the orders will remain in force and issue a return date to court.

22. The other respondents never entered appearance nor filed a response thereto.

23. The application was disposed of by way of written submissions. The applicant in submissions dated 15<sup>th</sup> April, 2024 identified two (2) issues for determination namely:

*a) Whether the operations and provision of telecommunication services in Kenya and other incidental activities thereto, requires a license*

*from the Communication Authority of Kenya  
and if it is an offence to operate without a valid  
license?*

*b) Whether an application for a search warrant is  
valid?*

24. The applicant submitted on the first issue by citing section 5 of the Kenya Information and Communications Act that provides that the object and purpose of the Commission is to license and regulate postal, information and communication services, while section 34 provides that a person who runs or provides a telecommunication system without a valid license under section 25 commits an offence.

25. That the telecommunication systems/infrastructures belonging to the 2<sup>nd</sup> respondent are known and/or have been identified to operate from commercial buildings to wit; Jupiter House, Soko Stalls and

Escarpment Hotel all in Mai Mahiu, and Luxor Plaza in Naivasha.

26. On whether the search warrant is valid, the applicant cited section 80 of the Kenya Information and Communication Act which provides for the grant of a search warrant where the court is satisfied by the information on oath that there is reasonable ground of suspecting an offence has been committed and the evidence is found in any premises specified in the information.

27. Further, section 90 of the Act provides for power to seize and detain property exercisable by a police officer under the Police Act (Cap 84) Laws of Kenya.

28. The applicant submitted that the equipment in question are portable switches that are easily disconnected and therefore there is need for a search warrant to enter the premises, vehicles and/or other designated structures owned and/or

operated by the respondents, and to search, seize and take possession of the telecommunication apparatus including operating manuals, electronic gadgets and any other relevant documents and material evidence that aid and/or run and/or provide the operations which will help mount a prima facie criminal case against all those found culpable.

29. The 8<sup>th</sup> respondent in submissions dated 18<sup>th</sup> April, 2024 identified two issues for determination: -

*a) Whether the ex parte orders sought by the applicant in Miscellaneous Criminal Application No. E022 of 2024 were final orders?*

*b) Whether the applicant is entitled to the orders sought?*

30. On the first issue, the 8<sup>th</sup> respondent reiterated that the intent and purpose of sections 118 and 118A of the Criminal Procedure Code does not warrant

issuance of final orders until the matter is heard inter parties.

31. He relied on the case of; Hassan Mohammed vs EACC & Another [2019] eKLR and Republic vs Prime Bank & another [2018] eKLR cited with approval in the case of Esther Wagio Njunge & 4 others vs Asset Recovery Agency & Another [2021] eKLR where it was stated that orders under section 118 and 121 of the Criminal Procedure Code must indicate the period the orders will remain in force but not exceeding 14 days, give a return date to court, and the orders must be served after the first ex parte hearing so that parties are heard before extension of the orders.

32. That further, in the case of; Samuel Watatua & Another vs Republic Nai Criminal Appeal No. 2 of 2013 (unreported) the Court of Appeal stated that, after ex parte orders are granted in an application

for seizure or freezing, the application should be served on the affected parties and no final orders should be issued until the matter is heard inter parties.

33. On whether the applicant is entitled to the orders sought, the 8<sup>th</sup> respondent submitted that, the trial court was accurate in declining to issue the orders sought as they were final orders and would have prejudiced him as he would have been condemned unheard contrary to Article 50 of the Constitution.

34. He urged the court not to disturb the directions by Hon. Ndengeri (PM) issued in Miscellaneous Criminal Application E022 of 2024 and the lower court be returned.

35. At the conclusion of arguments by the parties I note that the application has been brought under section 362 as read with section 364 of the Code, which govern the revisionary jurisdiction of the

High Court. The provisions of section 362 states as follows:

*“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court”.*

36. In the same manner, section 364 of the Codes states that: -

*“(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—*

*(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal*

*by sections 354, 357 and 358, and may enhance the sentence;*

*(b) in the case of any other order other than an order of acquittal, alter or reverse the order.*

*(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence: Provided that this subsection shall not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned.*

*(3) Where the sentence dealt with under this section has been passed by a subordinate court, the High Court shall not inflict a greater punishment for the offence which in the opinion of the High Court the accused has committed than*

*might have been inflicted by the court which imposed the sentence.*

*(4) Nothing in this section shall be deemed to authorize the High Court to convert a finding of acquittal into one of conviction.*

*(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed”.*

37. Pursuant to the aforesaid, an order of the trial will only be reviewed if it is either incorrect, illegal or improper. In that regard, the objective of revisionary jurisdiction is to set right a patent defect or error of jurisdiction or law. Consequently, the jurisdiction will only be invoked where the decision under challenge is; grossly onerous, there is no compliance with the provisions of the law, or the finding re-ordered are

based on no evidence, or material evidence is ignored or judicial discretion is exercised arbitrarily or perversely.

38. To deal with the issues herein it suffices to consider the provisions the applicant relied on in the application in the trial court. The applications in the trial court were premised under section 118, 118A and 121 of the Criminal Procedure Code.

39. The provisions of section 118 which states as follows: -

*“Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by*

*written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law.”*

40. Furthermore, section 118A of the Criminal Procedure Code, states that: -

*“An application for a search warrant under section 118 shall be made ex-parte to a Magistrate.”*

41. In the same manner, section 121 of the Criminal Procedure Code provides: -

*(1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.*

*(2) If an appeal is made, or if a person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.*

*(3) If no appeal is made, or if no person is committed for trial, the court shall direct the thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.*

42. The applications were further premised under sections 89(1) and 90 of the Kenya Information and Communications Act. Section 89(1) provides: -

(1) *If a court is satisfied by information on oath that there is reasonable ground for suspecting that an offence under the provisions of this Act has been or is being committed, and that the evidence of the commission of the offence is to be found on any premises specified in the information, or in any vehicle, vessel or aircraft so specified, it may grant a search warrant, authorising any person or persons authorised in that behalf by the Commission and named in the warrant, with any police officer, to enter, at any time within one month from the date of the warrant, the premises specified in the information or, as the case may be, the vehicle, vessel or aircraft so specified and to search such premises, vehicle, vessel or aircraft, and to examine and test any station or apparatus or obtain any article or thing*

*found in such premises, vessel, vehicle or aircraft.*

43. Whereas the provisions of section 90 of the afore Act states: -

*(1) A search warrant granted under section 89 may authorise the person or persons named in it to seize and detain, for the purposes of any relevant proceedings, any radio-communication apparatus, telecommunication apparatus, article or other thing found in the course of the search carried out in pursuance of the warrant which appears to have been used in connection with or to be evidence of the commission of any offence under this Act.*

*(2) If a police officer or any person authorised by a warrant to exercise the power conferred under this section has reasonable grounds to suspect that an offence under this Act has been*

*or is being committed, he may seize and detain, for the purposes of any relevant proceedings, any radio-communication apparatus, telecommunication apparatus article or other thing which appears to have been used in connection with or to be evidence of the commission of any such offence.*

*(3) Nothing in this section shall prejudice any power to seize or detain property which is exercisable by a police officer under the Police Act (Cap. 84).*

*(4) Any person who intentionally obstructs the authorised person in the exercise of the power conferred on him under subsection (2) commits an offence and shall be liable on conviction to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding one year, or to both.*

44. Pursuant to the afore provisions, the case of; Kago & another v Assets Recovery Agency (2022) eKLR, confirmed that Sections 118 and 121 of the Criminal Procedure Code (CPC), often read with Section 180 of the Evidence Act, empower Magistrates to issue search warrants and freeze bank accounts to preserve evidence. These provisions allow ex parte orders to protect investigation.

45. Similarly, in Petition No. 30 of 2019 (consolidated with) Petition No. 31 of 2019 -Ethics And Anti-Corruption Commission & Director of Public Prosecutions versus Prof. Tom Ojienda, Sc T/A Prof. Tom-Ojienda & Associates Advocates & 2 Others, the Supreme Court of Kenya affirmed the legality of using Section 118 of the CPC along with Section 180 of the Evidence Act in conjunction with Anti-Corruption and Economic Crime Act to obtain

warrants, upholding their constitutionality in investigative processes.

46. However, before a Magistrate can order for issuance of a warrant of arrest, it must be proved on oath to a Court or Magistrate that an item is necessary for an investigation or that an offence has been committed.

47. In the instant matter the applicant stated at paragraph 3 of the affidavit in support of the application that he was investigating a case of Running a Telecommunication Systems without a valid licence.

48. Furthermore, an application for a search warrant under Section 118 is typically made ex-parte to a Magistrate (without notice to the party against whom it is sought). This is justified to prevent the deliberate destruction of documents or evidence. The case of Ng'ang'a v Republic (DCI

Western Region Office) (2024) KEHC 16436 (KLR)

clarified that notifying a party before a search or freeze could "jeopardize incriminating evidence". Therefore, the order of the trial court herein to serve the respondent was improper and I set it aside accordingly.

49. However, if the court found that the wording of the application was not proper, all that it needed to do was to issue conditions under which the search warrant would be issued. The case of Hassan Mohammed v EACC & another (2019) eKLR established that the court must state a duration for the order and provide a date for the affected party to raise issues.

50. Consequently, I set aside the orders of the trial court herein and remit the matter back to the Chief Magistrate Court for further action. The file be

placed before the Chief Magistrate on or before the 30<sup>th</sup> day of March 2026.

51. It is so ordered.

Dated, delivered and signed on this 25<sup>th</sup> day of March 2026.

**GRACE L NZIOKA**

**JUDGE**

In the presence of:

N/A for the applicant

Mr. Wairegi for the 3<sup>rd</sup> respondent

Mr. Muiruri for the 8<sup>th</sup> respondent

Ms. Hannah: court assistant